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3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF CALIFORNIA
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6 TRUCEPT, INC. fka SMART-TEK
7 SOLUTIONS INC.,
8 Plaintiff,
9 v.
10 UNITED STATES INTERNAL
11 REVENUE SERVICE,
12 Defendant.
13

Case No.: 15-cv-0447-BTM-JMA

**ORDER GRANTING IN PART AND
DENYING WITHOUT PREJUDICE
IN PART DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

[ECF NO. 25]

14 The United States Internal Revenue Service ("IRS") has filed a motion for
15 summary judgment as to Plaintiff's claims under the Freedom of Information Act
16 ("FOIA"), 5 U.S.C. § 552, et seq. (ECF No. 25.) For the reasons discussed below,
17 the IRS's motion will be granted in part and denied without prejudice in part.

18 **I. BACKGROUND**

19 This is one of five actions filed by related entities against the IRS.¹ Each
20 case is based on the claim that the IRS failed to comply with its obligations under
21 5 U.S.C. § 552 to respond to FOIA requests submitted by the plaintiffs. Plaintiffs
22 contend they submitted their requests after the IRS filed a series of liens against
23 them between 2011 and 2013 holding them liable for payroll tax liabilities of other
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26 ¹ The five actions (including this one) are: Trucept, Inc., fka Smart Tek Solutions Inc. v. United States Internal
27 Revenue Service, Case No. 15-cv-0447-BTM-JMA; Smart-Tek Services, Inc. v. United States Internal Revenue
28 Service, Case No. 15-cv-0449-BTM-JMA; Smart-Tek Service Solutions Corp. v. United States Internal Revenue
Service, Case No. 15-cv-0452-BTM-JMA; Smart-Tek Automated Services, Inc. v. United States Internal Revenue
Service, Case No. 15-cv-0453-BTM-JMA; and American Marine LLC v. United States Internal Revenue Service,
Case No. 15-cv-0455-BTM-JMA.

1 corporations under alter ego and/or successor liability theories.

2 Plaintiff Trucept, Inc., fka Smart-Tek Solutions Inc. ("Plaintiff") alleges it sent
3 a written FOIA request to the IRS on May 12, 2014. Compl. (ECF No. 1) ¶ 10.
4 Under 5 U.S.C. § 552(a)(6)(A)(i), an agency has 20 business days following receipt
5 of a FOIA request to determine whether to comply with the request and must
6 "immediately" notify the requester of its determination. 5 U.S.C. § 552(a)(6)(A)(i).
7 On June 26, 2014, the IRS allegedly sent a response to Plaintiff in which it
8 acknowledged receipt of the request but "failed to make any determination about
9 the request." Compl. ¶ 11. On February 27, 2015, having received no further
10 response from the IRS, Plaintiff initiated this action.

11 On October 7, 2016, the IRS filed the instant motion. It indicates it has now
12 completed its search for records and released 2,319 pages in full, and 617 pages
13 in part, of non-exempt documents responsive to Plaintiff's FOIA request. Mot.
14 Summ. J. at 1:9-15. It seeks summary judgment on the ground that it has fully
15 discharged its obligations under 5 U.S.C. § 552. Plaintiff opposes the motion.
16 (ECF No. 27.)

17 **II. DISCUSSION**

18 **A. FOIA Summary Judgment Standard**

19 Summary judgment is appropriate if the evidence, when viewed in the light
20 most favorable to the non-moving party, demonstrates "there is no genuine dispute
21 as to any material fact." Fed. R. Civ. P. 56(a); see Celotex Corp. v. Catrett, 477
22 U.S. 317, 322 (1986). The moving party bears the initial burden of showing there
23 is no material factual dispute and he or she is entitled to prevail as a matter of law.
24 Celotex, 477 U.S. at 323. If the moving party meets its burden, the nonmoving
25 party must go beyond the pleadings and identify specific facts which show a
26 genuine issue for trial. Id. at 324.

27 District courts are directed to conduct a *de novo* review of the adequacy of
28 an agency's response to a FOIA request. 5 U.S.C. § 552(a)(4)(B); U.S. Dep't of

1 Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989).
2 Because FOIA cases rarely involve material factual disputes, they “are typically
3 and appropriately decided on motions for summary judgment.” Defenders of
4 Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 97 (D.D.C. 2009); see
5 Shannahan v. Internal Revenue Serv., 637 F. Supp. 2d 902, 912 (W.D. Wash.
6 2009). Courts “follow a two-step inquiry when presented with a motion for
7 summary judgment in a FOIA case.” Shannahan, 637 F. Supp. 2d at 912.

8 First, the district court must determine whether the agency has established
9 that it fully discharged its obligation under FOIA to conduct an adequate search for
10 responsive records. Zemansky v. U.S. Env'tl. Prot. Agency, 767 F.2d 569, 571 (9th
11 Cir. 1985). To meet this burden, the agency must:

12 demonstrate that it has conducted a “search reasonably calculated to
13 uncover all relevant documents.” Further, the issue to be resolved is
14 not whether there might exist any other documents possibly responsive
15 to the request, but rather whether the search for those documents was
16 adequate. The adequacy of the search, in turn, is judged by a standard
17 of reasonableness and depends, not surprisingly, upon the facts of
18 each case. In demonstrating the adequacy of the search, the agency
19 may rely upon reasonably detailed, nonconclusory affidavits submitted
20 in good faith.

21 Id. (quoting Weisberg v. U.S. Dep't of Justice (“Weisberg II”), 745 F.2d 1476, 1485
22 (D.C. Cir. 1984)).

23 If the agency satisfies its initial burden, the court proceeds to the second step
24 and considers “whether the agency has proven that the information that it did not
25 disclose falls within one of nine FOIA exemptions.” Shannahan, 637 F. Supp. 2d
26 at 912 (quoting Los Angeles Times Commc'ns, LLC v. Dep't of the Army, 442 F.
27 Supp. 2d 880, 894 (C.D. Cal. 2006)). Agencies seeking to withhold documents
28 pursuant to a FOIA exemption “have been required to supply the opposing party
and the court with a ‘*Vaughn* index,’ identifying each document withheld, the
statutory exemption claimed, and a particularized explanation of how disclosure of

1 the particular document would damage the interest protected by the claimed
2 exemption.” Wiener v. Fed. Bureau of Investigation, 943 F.2d 972, 977 (9th Cir.
3 1991); see Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973). “The purpose
4 of a *Vaughn* index ‘is ... to afford the requester an opportunity to intelligently
5 advocate release of the withheld documents and to afford the court the opportunity
6 to intelligently judge the contest.” Shannahan, 637 F. Supp. 2d at 912 (quoting
7 Wiener, 943 F.2d at 979).

8 Finally, “even if the agency satisfies the two-part test, it generally must still
9 disclose any reasonably segregable portions of the withheld documents.” Id.; 5
10 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided
11 to any person requesting such record after deletion of the portions which are
12 exempt under this subsection.”). “The burden is on the agency to establish that
13 all reasonably segregable portions of a document have been segregated and
14 disclosed.” Id. (quoting Pac. Fisheries Inc. v. United States, 539 F.3d 1143, 1148
15 (9th Cir. 2008)).

16 B. Reasonableness of Search

17 The IRS contends it has conducted an adequate search for records
18 responsive to Plaintiff’s FOIA request. To fulfill its obligations under FOIA, “the
19 agency must show that it made a good faith effort to conduct a search for the
20 requested records, using methods which can be reasonably expected to produce
21 the information requested.” Oglesby v. U.S. Dep’t of the Army, 920 F.2d 57, 68
22 (D.C.Cir.1990). The agency must show “[w]hat records were searched, by whom,
23 and through what process.” Steinberg v. U.S. Dep’t of Justice, 23 F.3d 548, 552
24 (D.C. Cir. 1994). An agency can meet its burden by submitting a “reasonably
25 detailed, nonconclusory” affidavit “in good faith.” Id. at 551 (quoting Weisberg II,
26 745 F.2d at 1485). Agency affidavits that “do not denote which files were searched
27 or by whom, do not reflect any systematic approach to document location, and do
28 not provide information specific enough to allow the plaintiff to challenge the

1 procedures utilized” are insufficient to fulfill the agency’s burden. Weisberg v. U.S.
2 Dep’t of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980). In determining whether an
3 agency has met its burden to prove an adequate search, “the facts must be viewed
4 in the light most favorable to the requestor.” Zemansky, 767 F.2d at 571 (citing
5 Weisberg II, 745 F.2d at 1485).

6 The IRS submits the declaration of Delphine Thomas as proof it conducted
7 an adequate search for records responsive to Plaintiff’s FOIA request. (ECF No.
8 25-5.) Thomas is a Senior Disclosure Specialist whose duties include responding
9 to FOIA requests for IRS records, which requires her to “have knowledge of the
10 types of documents created and maintained by the various divisions and functions
11 of the Service and an understanding of the provisions of the FOIA.” Thomas Decl.
12 ¶ 1.

13 Thomas states that the disclosure specialists initially assigned to respond to
14 Plaintiff’s FOIA are now retired or in different positions and are thus “unavailable
15 to declare.” Id. ¶ 3. To familiarize herself with the search conducted prior to her
16 involvement, she reviewed the previously-assigned disclosure specialists’ case
17 notes. Id.

18 She states the IRS received a written FOIA request from Plaintiff on June
19 20, 2014, seeking “‘a complete copy of the administrative file’ for Trucept, Inc., ‘for
20 tax forms 940, 941, 1120 and 1065 for years 2007-2014.’” Id. ¶ 4.² On June 26,
21 2014, “to search for files,” disclosure specialist Irma Rentas used the IRS’s
22 Integrated Data Retrieval System (“IDRS”), an electronic system that “manages
23 data that has been retrieved from the Master File System” which is “the Service’s
24 nation-wide electronic information system containing permanent taxpayer account
25 information.” Id. ¶¶ 6-8. Rentas located information regarding Plaintiff’s “tax
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28 ² Although Thomas states a copy of the FOIA request is attached as Exhibit A to her declaration, it was not actually attached. See Thomas Decl. ¶ 4.

1 account information that fell within the scope of plaintiff's FOIA request" by
2 following general practice for a records search, which is to enter the taxpayer
3 identification number (TIN) into IDRS using certain command codes to retrieve
4 information for the relevant tax years. Id. ¶¶ 9, 10.

5 From her IDRS search, Rentas "ascertained that Revenue Officer John
6 Black (RO [Black]) was assigned to the collection matter of Smart-Tek Services."
7 Id. ¶ 11. "[T]he Disclosure Office learned from RO Black that documents
8 responsive to [Plaintiff's] requests would be located within the commingled files
9 maintained by RO Black on these entities and over twenty (20) related entities."
10 Id. ¶ 12. RO Black "began a collection proceeding for one of the Smart-Tek entities
11 and, as he progressed, he realized all the entities were related." Id. He "had all
12 the case files he identified transferred to him" and then "started working the case
13 files as one large case file." Id. Thereafter, when he "received or created new
14 documents, he added them to the commingled file in chronological order, not
15 based on a particular entity" so that "the files for plaintiff and all of the other entities
16 were all mixed together." Id. ¶ 13. According to RO Black, "his commingled file
17 was stored in sixty-five (65) boxes," id., which the Disclosure Office later
18 determined contained "around 141,000 pages." Id. ¶ 14.

19 Thomas indicates that another disclosure specialist, Ed Pullman, called
20 Plaintiff's representative "to confirm [the] request was for the administrative file
21 maintained by Collection personnel." Id. ¶ 15. Thomas, Pullman, and disclosure
22 specialist Athena Amparano, later joined by "attorneys and law clerks in the Office
23 of Chief Counsel," worked from August 2014 through fall 2015 to "search for
24 responsive documents within the commingled administrative file." Id. ¶¶ 16-23.
25 "Amidst the approximately 141,000 pages of documents my colleagues and I
26 located 3,056 pages of documents responsive to Trucept's request." Id. ¶ 25. She
27 concludes, "[t]o my knowledge, there are no other records responsive to Plaintiff's
28 request." Id. ¶ 26.

1 Plaintiff argues Thomas's declaration is insufficient to demonstrate the
2 adequacy of the IRS's search, because it fails to explain what documents the
3 commingled files contained, the methodology used to review the 65 boxes of
4 documents, criteria for selecting responsive documents, and because it does not
5 identify the entities whose records were in the commingled file. Pl.'s Opp. at 6-7.

6 The Court agrees with Plaintiff in part. To sustain its burden, the IRS must
7 show "[w]hat records were searched, by whom, and through what process."
8 Steinberg, 23 F.3d at 552. Although a "reasonably detailed, nonconclusory"
9 affidavit submitted "in good faith" will generally meet this burden, id. at 551 (quoting
10 Weisberg II, 745 F.2d at 1485), in key respects, Thomas's declaration is too
11 conclusory to suffice.

12 First, the declaration provides no indication how the IRS interpreted Plaintiff's
13 FOIA request (as initially submitted in writing, or as subsequently clarified), nor
14 does it provide an explanation of the scope or categories of documents it
15 determined were responsive to the request. Thomas states, for example, that "all
16 of plaintiff's tax account information that fell within the scope of plaintiff's FOIA
17 request was discovered through IDRS," Thomas Decl. ¶ 10, but she never
18 indicates what that "information" was. Federal agencies responding to FOIA
19 requests are required to use search methods which can reasonably be expected
20 to yield the information requested. Lane v. Dep't of Interior, 523 F.3d 1128, 1139
21 (9th Cir. 2008). Without knowing what records the IRS was searching for in
22 response to Plaintiff's request, the Court has no context for evaluating the
23 reasonableness of the IRS's search methods.

24 Second, Thomas's declaration fails to give sufficient information about the
25 IRS's review of the 65 boxes of documents. The IRS spent months reviewing the
26 boxes and removing particular documents, but it has not explained what criteria or
27 search parameters the team used to determine which documents to remove for
28 production. Although an agency need only prove its search was "reasonably

1 calculated to uncover all relevant documents,” Zemansky, 767 F.2d at 571, to
2 evaluate the adequacy of the IRS’s search, the Court needs information regarding
3 the document review to determine whether the IRS’s search of the 65 boxes was
4 reasonable. See County of Santa Cruz v. Ctrs. for Medicare and Medicaid Servs.,
5 No. C-07-2889 MMC, 2009 WL 816633, at *2 (N.D. Cal. Mar. 26, 2009) (holding
6 IRS failed to demonstrate reasonableness of search where supporting
7 declarations reported that searches of various files located no responsive
8 documents, without explaining “the process used to conduct [the IRS’s] search”).

9 Next, the Court turns to Plaintiff’s argument that the IRS cannot establish the
10 reasonableness of its search without identifying the other entities whose records
11 were in the 65-box commingled file. Opp. at 7. The IRS did not address this
12 argument in its reply brief. See Reply (ECF No. 30) at 3-4.

13 Two countervailing principles seem to bear upon Plaintiff’s contention. On
14 the one hand, the Court must make a de novo determination of the adequacy IRS’s
15 response to Plaintiff’s FOIA request, Reporters Comm. for Freedom of Press, 489
16 U.S. at 755, and it must be able to “intelligently judge the contest” to perform this
17 role. Wiener, 943 F.2d at 977. On the other hand, withholding information relating
18 to return information of another taxpayer or taxpayers, including the identity of
19 third-party taxpayers, is authorized under 5 U.S.C. § 552(b)(3), in conjunction with
20 26 U.S.C. § 6103(a), and 5 U.S.C. § 552 (b)(7)(C). See Johnson v. Comm’r of
21 Internal Revenue, 239 F. Supp. 2d 1125, 1128-29 (W.D. Wash. 2002).

22 Setting aside the merits of Plaintiff’s argument, as a threshold issue, it seems
23 likely that the alleged alter egos’ identities have already been disclosed. “[O]nce
24 tax return information is made a part of the public domain, the taxpayer may no
25 longer claim a right of privacy in that information” and “‘§ 6103’s directive to keep
26 return information confidential is moot.’” Lampert v. United States, 854 F.2d 335,
27 338 (9th Cir. 1988) (quoting Figur v. United States, 662 F. Supp. 515, 517 (N.D.
28 Cal. 1987). Bonar is Plaintiff’s president, and he indicates in a declaration

1 submitted in support of Plaintiff's opposition that Plaintiff issued its FOIA request
2 after being served with an IRS lien based on "payroll tax liabilities of unrelated
3 corporations." Decl. Brian Bonar ¶ 2. Presumably the alleged alter egos were
4 identified in the IRS lien. Such a presumption seems supported by Bonar's
5 declaration; he describes the entities as "unrelated corporations," and his
6 characterization of the corporations as "unrelated" implies he knows who they are.
7 Also, in researching the relevant legal issues, the Court encountered the district
8 court's opinion in Goldberg v. United States, No. 13-61528-CIV, 2015 U.S. Dist.
9 LEXIS 104815, at *3-4 n.2 (S.D. Fla. Aug. 5, 2015). The Goldberg litigation
10 apparently arose from the same investigation of RO Black, and the district court's
11 order appears to have disclosed the names of the entities involved. See id. If so,
12 under Lampert, disclosing their names in this litigation would appear not to run
13 afoul of § 6103(a).

14 The fact that any privilege pertaining to the identities of the alter egos may
15 have been dispelled does not necessarily mean the identity of every entity whose
16 files were in the 65 boxes has to be disclosed to establish the reasonableness of
17 the IRS's search. At this stage, the record regarding the search the IRS undertook
18 is not yet complete, and the Court will reserve ruling on the merits of Plaintiff's
19 argument until the record is more fully developed.

20 Based on the foregoing, the Court finds the IRS has failed to carry its burden
21 to demonstrate the adequacy of its search. Its motion for summary judgment will
22 be denied without prejudice.

23 C. Withholding of Responsive Documents Pursuant to FOIA Exemptions

24 The IRS indicates it withheld all or part of responsive documents pursuant to
25 FOIA exemptions.

- 26 1. 5 U.S.C. §§ 552(b)(3) ("Exemption 3"), (b)(6) ("Exemption 6"),
27 (b)(7)(C) ("Exemption 7(C)")

28 The IRS withheld responsive information pursuant to FOIA Exemptions 3, 6,

1 and 7(C). Under Exemption 3, matters “specifically exempted by statute” are
2 deemed exempted under FOIA “if that statute—(A)(i) requires that the matters be
3 withheld from the public in such a manner as to leave no discretion on the issue;
4 or (ii) establishes particular criteria for withholding or refers to particular types of
5 matters to be withheld....” 5 U.S.C. § 552(b)(3)(A). 26 U.S.C. § 6103 is a provision
6 within the IRS Code and has been determined to be an Exemption 3 statute. Long
7 v. United States, 742 F.2d 1173, 1178 (9th Cir. 1984). Section 6103(a) provides
8 that taxpayer “returns and return information shall be confidential.” 26 U.S.C. §
9 6103(a). “Return information” is defined to include, among other things, “a
10 taxpayer’s identity, the nature, source, or amount of his income, payments,
11 receipts, deductions, exemptions, credits, assets, liabilities, ... whether the
12 taxpayer’s return was, is being, or will be examined or subject to other investigation
13 or processing, or any other data ... with respect to a return.....” 26 U.S.C. §
14 6103(b)(2). Here, pursuant to Exemption 3, the IRS withheld documents because
15 they contained information of “taxpayers other than the plaintiff.” Queener Decl.
16 ¶¶ 14, 15.

17 Exemption 6 restricts from disclosure “personnel and medical files and
18 similar files the disclosure of which would constitute a clearly unwarranted invasion
19 of personal privacy.” 5 U.S.C. § 552(b)(6). Under Exemption 6, the IRS withheld
20 all, or parts, of documents because they contain information relating to “taxpayers,”
21 tax preparers, and/or persons other than Plaintiff. Queener Decl. ¶¶ 19, 20.

22 Exemption 7(C) requires withholding of records or information compiled for
23 law enforcement purposes, but only to the extent the production of such
24 information “could reasonably be expected to constitute an unwarranted invasion
25 of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Under Exemption 7(C), the IRS has
26 withheld 17 pages of documents “concerning plaintiff in which personal identifying
27 information for taxpayers other than plaintiff was withheld.” Queener Decl. ¶ 23(a).

28 At this stage, the Court will reserve ruling on the validity of the IRS’s

1 withholding of information under Exemptions 3, 6, and 7(C). Plaintiff's essential
2 contention in this case is that the IRS wrongfully failed to produce documents
3 pertaining to alter ego entities whose tax liability was the basis for the lien against
4 Plaintiff. The information withheld on the basis of each of the foregoing exemptions
5 relates to unidentified "taxpayers" other than Plaintiff. Some of these taxpayers
6 may be the alter ego entities whose documents Plaintiff seeks. The IRS disputes
7 whether Plaintiff can obtain tax information relating to Plaintiff's alter egos without
8 an authorization from the alter ego. Plaintiff cannot obtain such an authorization,
9 however, without knowing which entities' records have been withheld. Although
10 the IRS claims even the names of the alter egos are protected from disclosure, if
11 those names have already been published such that any related privacy interest
12 has been lost, there would appear to be no impediment to identifying, in
13 subsequent briefing, any alter ego taxpayers whose records were withheld. If the
14 IRS can disclose those names in subsequent proffers, Plaintiff will have the
15 opportunity to more intelligently advocate for disclosure of the withheld information.
16 Wiener, 943 F.2d at 977.

17 The Court will therefore reserve determining whether the IRS has sufficiently
18 established the validity of its withholding of information under Exemptions 3, 6, and
19 7(C) until these issues have been more fully developed.

20 2. 5 U.S.C. § 552(b)(5) ("Exemption 5")

21 Exemption 5 protects from disclosure "inter-agency or intra-agency
22 memorandums or letters that would not be available by law to a party other than
23 an agency in litigation with the agency...." 5 U.S.C. § 552(b)(5). "This exemption
24 entitles an agency to withhold . . . documents which a private party could not
25 discover in litigation with the agency." Pac. Fisheries, 539 F.3d at 1148 (quoting
26 Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997)).
27 "Exemption 5 thus covers the attorney-client privilege, the attorney work-product
28 privilege, and the executive 'deliberative process' privilege." Maricopa, 108 F.3d

1 at 1092.

2 Pursuant to Exemption 5, the IRS withheld parts of four pages of documents
3 (pages 1919-20 and 1929-30) on the grounds the withheld information is protected
4 by the attorney-client privilege. Queener Decl. ¶ 16. “The attorney-client privilege
5 protects confidential disclosures made by a client to an attorney in order to obtain
6 legal advice, ... as well as an attorney's advice in response to such disclosures.”
7 United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (internal quotation and
8 citation omitted).

9 The IRS submits the declaration of Jacqueline Kay Queener, an attorney in
10 the IRS's Office of Chief Counsel, in support of its decision to withhold responsive
11 information under Exemption 5. Queener Decl. ¶¶ 16-18. She indicates the
12 withheld information consisted of confidential written communications between RO
13 Black and Mindy Meigs, an attorney in the IRS Office of Chief Counsel, in which
14 Black sought, and Meigs provided, legal advice concerning Black's collection of
15 Plaintiff's outstanding tax liabilities, and the alter ego or successor liability status
16 of entities that might be pursued for collection. Id. ¶ 19(a). She also indicates she
17 is familiar with FOIA's segregation requirements, and that the IRS complied with
18 such requirements in withholding the referenced information. Id. ¶ 13.

19 The Court finds the information in the Queener declaration sufficiently
20 detailed and non-conclusory to support the conclusion that the withheld information
21 falls within the scope of the attorney-client privilege. Ruehle, 583 F.3d at 607. The
22 Court also finds the IRS complied with its duty to produce reasonably segregable
23 portions of documents containing such information.

24 Accordingly, the Court grants the IRS's motion for summary judgment as to
25 its determination that the foregoing information was exempt from disclosure
26 pursuant to Exemption 5.

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1 3. 5 U.S.C. § 552(b)(7)(A) (“Exemption 7(A)”)

2 Exemption 7(A) relates to “records or information compiled for law
3 enforcement purposes” to the extent production of such information “could
4 reasonably be expected to interfere with enforcement proceedings....” 5 U.S.C. §
5 552(b)(7)(A). To support withholding information or records under Exemption 7(A),
6 an agency “must establish only that they were investigatory records compiled for
7 law enforcement purposes and that production would interfere with pending
8 enforcement proceedings.” Barney v. Internal Revenue Service, 618 F.2d 1268,
9 1272-73 (8th Cir. 1980). For purposes of Exemption 7(A), the IRS is a law
10 enforcement agency, Shannahan v. Internal Revenue Serv., 680 F. Supp. 2d 1270,
11 1281 (W.D. Wash. 2010), and civil tax enforcement proceedings are “enforcement
12 proceedings,” Barney, 618 F.2d at 1273. “The IRS need only make a general
13 showing that disclosure of its investigatory records would interfere with its
14 enforcement proceedings.” Lewis v. Internal Revenue Serv., 823 F.2d 375, 380
15 (9th Cir. 1987). “[D]isclosure of such records as witness statements, documentary
16 evidence, agent’s work papers and internal agency memoranda, prior to the
17 institution of civil or criminal tax enforcement proceedings, would necessarily
18 interfere with such proceedings by prematurely revealing the government’s case.”
19 Barney, 618 F.2d at 1273; see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214,
20 236-37 (1978).

21 The IRS withheld two pages of documents in full, and one page in part, under
22 Exemption 7(A). Queener Decl. ¶ 21; Savala Decl. ¶ 8. The withheld information
23 relates to an email from an attorney to an AUSA regarding possible abusive or
24 criminal tax-related activity by one of his clients, and an email exchange between
25 two IRS special agents and an AUSA regarding the attorney’s tip. Savala Decl. ¶
26 8(a), (b). Savala indicates the information relates to “ongoing collection of
27 plaintiff’s outstanding tax liabilities” and that release of the withheld information
28 stands to forestall or interfere with the IRS’s collection activities. Id.

1 The Court finds the information in the Queener and Savala affidavits
2 sufficient to support the IRS's claim that the withheld information falls within
3 Exemption 7(A), and that it complied with its duty to reasonably segregate and
4 produce non-exempt information. See Queener Decl. ¶ 13. Accordingly, the IRS's
5 motion for summary judgment will be granted on this ground.

6 4. 5 U.S.C. § 552(b)(7)(D) ("Exemption 7(D)")

7 Exemption 7(D) protects information compiled for law enforcement purposes
8 from disclosure to the extent it

9 could reasonably be expected to disclose the identity of a confidential
10 source, including a State, local, or foreign agency or authority or any
11 private institution which furnished information on a confidential basis,
12 and, in the case of a record or information compiled by criminal law
13 enforcement authority in the course of a criminal investigation or by an
agency conducting a lawful national security intelligence investigation,
information furnished by a confidential source[.]

14 5 U.S.C. § 552(b)(7)(D). Exemption 7(D) "has long been recognized as affording
15 the most comprehensive protection of all of FOIA's law enforcement exemptions."
16 Billington v. U.S. Dep't of Justice, 301 F. Supp. 2d 15, 22 (D.D.C. 2004). To invoke
17 its protections, an agency must show the particular source "provided information
18 under an express assurance of confidentiality or in circumstances from which such
19 an assurance could be reasonably inferred." U.S. Dep't of Justice v. Landano,
20 508 U.S. 165, 172 (1993). "A source should be deemed confidential if the source
21 furnished information with the understanding that the [agency] would not divulge
22 the communication except to the extent [it] thought necessary for law enforcement
23 purposes." Id. at 174.

24 The IRS withheld 38 pages in full, and two pages in part, under Exemption
25 7(D). Queener Decl. ¶ 24. The IRS relies on the declaration of Ms. Queener, who
26 attests the documents were withheld or redacted because "they contain either the
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1 identity, or sufficient information from which the identity could readily be discerned,
2 of sources of information that furnished information” to the IRS “with the
3 understanding that it would only be divulged to the extent necessary to facilitate
4 ongoing efforts ... to enforce the Federal tax laws as applied to plaintiff.” Queener
5 Decl. ¶¶ 24, 25.

6 The Court finds the IRS’s evidence sufficient to show the withheld
7 information is protected under Exemption 7(D). Landano, 508 U.S. at 174. The
8 IRS has also sufficiently demonstrated it complied with its duty to reasonably
9 segregate and produce non-exempt information. Accordingly, the Court will grant
10 the IRS’s motion for summary judgment as to the validity of its withholding of the
11 foregoing information under Exemption 7(D).

12 5. 5 U.S.C. § 552(b)(7)(E) (“Exemption 7(E)”)

13 Exemption 7(E) protects information compiled for law enforcement purposes
14 from disclosure to the extent it “would disclose techniques and procedures for law
15 enforcement investigations or prosecutions, or would disclose guidelines for law
16 enforcement investigations or prosecutions if such disclosure could reasonably be
17 expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). To establish
18 this exemption, “the Government must show that the technique that would be
19 disclosed under the FOIA request is a technique unknown to the general public.”
20 Pully v. Internal Revenue Serv., 939 F. Supp. 429, 438 (E.D. Va. 1996) (citing
21 Malloy v. Dep’t of Justice, 457 F. Supp. 543, 545 (D.D.C. 1978)).

22 The IRS withheld nine pages of documents in part pursuant to Exemption
23 7(E). Queener Decl. ¶ 26. Ms. Queener avers that the redacted information
24 relates to Plaintiff’s “Risk Score,” “which reflects the Service’s assessment of the
25 priority of having the taxpayer’s account assigned to a dedicated collection
26 specialist to actively pursue collection of the taxpayer’s outstanding liabilities.” Id.

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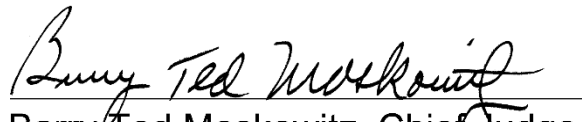
1 However, her declaration does not address whether the Risk Score is a “technique
2 unknown to the general public.” Pully, 939 F. Supp. at 438. Accordingly, the IRS’s
3 evidence is insufficient to support withholding under Exemption 7(E), and the Court
4 will deny summary judgment without prejudice as to this exemption.

5 **III. CONCLUSION AND ORDER**

6 For the reasons discussed above, the IRS’s motion for summary judgment
7 is GRANTED IN PART and DENIED WITHOUT PREJUDICE in part.

8 IT IS SO ORDERED.

9 Dated: July 5, 2017

10 
11 Barry Ted Moskowitz, Chief Judge
12 United States District Court
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